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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1140

SISALCORDS DO BRAZIL, LTD.,

versus

FIACAO BRASILEIRA DE SISAL, S.A.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OFFICIAL REPORT BELOW

The case below is reported as *Sisalcords Do Brazil Ltd. v. Fiacao Brasileira De Sisal,* 450 F.2d 419 (5th Cir. 1971). The opinion of the Court of Appeals for the Fifth Circuit is appended hereto.

JURISDICTIONAL STATEMENT

The Court of Appeals for the Fifth Circuit entered its opinion on October 28, 1971, and a judgment was that day entered in accordance with Rule 36 of the Federal Rules of Appellate Procedure. On December 8, 1971, the United States Court of Appeals for the Fifth Circuit entered an opinion order on the Petition For

Rehearing and Petition For Rehearing En Banc denying same.

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254 (1).

QUESTION FOR REVIEW

ARE RIGHTS OF A FOREIGN BENEFICIARY UNDER AN INTERNATIONAL IRREVOCABLE LETTER OF CREDIT SUBJECT TO SEIZURE AS PROPERTY OF THE FOREIGN BENEFICIARY FOR THE PURPQSE OF ACQUIRING JURISDICTION OF THE FOREIGN BENEFICIARY IN AMERICAN COURTS?

STATUTES INVOLVED

The following Louisiana procedural statutes are involved in a consideration of this cause. These relate to the manner of obtaining jurisdiction over a non-resident by way of attachment and garnishment of the non-resident's property.

Art. 8.

A court which is otherwise competent under the laws of this state has jurisdiction to enforce a right in, to, or against property having a situs in this state, claimed or owned by a nonresident not subject personally to the jurisdiction of the court. LSA-CCP Art. 8

Art. 9.

A court which is otherwise competent under the laws

of this state has jurisdiction to render a money judgment against a nonresident not subject personally to the jurisdiction of the court only if the action is commenced by an attachment of his property in this state. Unless the nonresident subjects himself personally to the jurisdiction of the court, the judgment may be executed only against the property attached. LSA-CCP Art. 9

Art. 2411.

The judgment creditor, by petition and after the issuance of a writ of fieri facias, may cause a third person to be cited as a garnishee to declare under oath what property he has in his possession or under his control belonging to the judgment debtor and in what amount he is indebted to him, even though the debt may not be due. He may require the third person to answer categorically and under oath the interrogatories annexed to the petition within the delay provided by Article 2412.

The seizure shall take effect upon service of the petition, citation, and interrogatories. LSA-CCP Art. 2411

Art. 3541.

A writ of attachment may be obtained when the defendant:

...

(5) Is a nonresident who has no duly appointed agent for service of process within the state. LSA-CCP Art. 3541

STATEMENT OF THE CASE

Petitioner, Sisalcords do Brazil is a New York corporation engaged in the business of importing and distributing sisal. Respondent is Fiacao Brasileira De Sisal, S.A., ("FIBRASA") a Brazilian corporation engaged in the exportation of sisal baler twine. The litigation between the parties originally commenced in the state courts of New York. A default judgment was obtained against respondent. In this action, Petitioner originally sought merely to execute this judgment against the property of FIBRASA allegedly within the jurisdiction of Louisiana Courts.

This action commenced in Louisiana State Courts on March 20, 1970 by writs of non-resident attachment and garnishment coupled with service of interrogatories. Respondent removed the cause to the United States District Court for the Eastern District of Louisiana on the grounds of diversity of citizenship.

In the Louisiana action, petitioner secured a writ of attachment and garnishment against the property of the defendant in the hands of garnishee, Hibernia National Bank. On March 20, 1970, the bank was cited and served with writs and garnishment interrogatories. The attachment and garnishment with interrogatories was levied at certain letters of credit believed to have been issued by the bank naming Respondent as beneficiary.

Prior to the bank garnishee's answers to interrogatories, but subsequent to removal, the New York judg-

ment was vacated, and Petitioner amended its petition to state its claims against respondent and maintain the attachment of the respondent's property.

In due course, the garnishee, Hibernia, answered the garnishment interrogatories stating that it had no property of the defendant subject to attachment. The respondent moved to dismiss the cause on the grounds of lack of jurisdiction over the person and/or property of the defendant. The District Court, the Honorable Judge Edward Boyle presiding, determined that Hibernia Bank had no property of the defendant subject to garnishment and attachment; thus, there was no jurisdiction. Petitioner prosecuted an appeal to the Court of Appeals, Fifth Circuit. The Court of Appeals affirmed the District Court and denied a rehearing in the case. From an adverse judgment petitioner brings this application for certiorari.

Hibernia National Bank, in answering the interrogatories of petitioner, stated it had no property of the defendant, but stated *facts* which indicated that the garnishee did have property of the defendant subject to garnishment, and that, *prior to answering petitioner's garnishment interrogatories but subsequent to service of same, did pay to the respondents or its agents the property subject to garnishment herein.* That property consisted of sums due and owing by the garnishee bank unconditionally to the respondent beneficiary under a certain letter of credit issued prior to attachment, and upon which drafts and bills of lading of the respondent had been drawn and which were in fact honored and paid by the garnishee bank to the

respondent or its agent upon presentation after service of the garnishment interrogatories, but before garnishee's answer thereto. (App., 27).

Garnishee's "Answer to Interrogatories" reveals the following facts:

(1) On February 9, 1970, garnishee did establish Irrevocable Letter of Credit No. 24349 and did on March 6, 1970, establish Irrevocable Letter of Credit No. 24381, for the account of Twi-Ro-Pa Mills Agency, Inc. of New Orleans, and in *favor of defendant* herein, Fiacao Brasileira de Sisal, S.A. ("Fibrasa").

(2) On or about February 9, 1970, (on the same date as the first letter of credit was issued by garnishee herein), defendant Fibrasa executed three drafts against the aforementioned letters of credit for amounts which are presently unknown by plaintiff, but believed to be in the amount of approximately $200,000.00. Said drafts were payable to Banco Do Brazil, S.A. and were forwarded to garnishee together with bills of lading, etc. There were bills of lading executed the same date and were drawn in accordance with the letter of credit in favor of Hibernia.

(3) Garnishee released, by endorsement, the bills of lading to Twi-Ro-Pa Mills (executed prior to garnishment and drawn in favor of Hibernia), paid the drafts drawn by Fibrasa against the irrevocable letter of credit executed in favor of Fibrasa, all in accordance with the instructions of Fibrasa or its collection agent. These events took place subsequent to the in-

stitution of these proceedings, with their service of writs of attachment and garnishment with interrogatories and prior to the garnishee's answer.

The transaction upon which petitioner's attachment was based was a classic letter of credit arrangement. Twi-Ro-Pa Mills Agency, Inc. of New Orleans apparently desired to purchase from the respondent, certain baler twine (or other commodity) manufactured by the defendant in Brazil. Twi-Ro-Pa ordered the twine from defendant, and then prevailed upon Hibernia to establish an irrevocable letter in favor of the beneficiary seller, Fibrasa.

The letter of credit was Hibernia's Irrevocable Letter of Credit No. 24349, dated February 9, 1970 in the amount of $206,087.00 (U.S.$). This letter was "forwarded through Banco Da Bahia, S. A., Joao Pessoa, Paraiba, Brazil" to the respondent. In relevant parts the letter provided that:

> "We hereby establish our Irrevocable Letter of Credit in your favor, for account of Twi-Ro-Pa Mills Agency, Inc., New Orleans, Louisiana for any sum or sums not exceeding: TWO HUNDRED SIX THOUSAND EIGHTY-SEVEN AND NO/100 U. S. DOLLARS available by your drafts on The Hibernia National Bank in New Orleans, New Orleans, Louisiana, at sight to be accompanied by the following documents
> * * *

> "Drafts drawn under this Credit must be marked: 'Drawn under the Hibernia National Bank in New Orleans Letter of Credit No. 24349 dated February 9, 1970', and must be negotiated or presented on or before May 25, 1970, on which date this credit expires."

> "We hereby engage with the bonafide holders, endorsers and drawers of such drafts that are drawn under and in compliance with the terms of this Credit, that same will meet with due honor on presentation and delivery of the documents as specified at The Hibernia National Bank in New Orleans, New Orleans, Louisiana."

The letters of credit did not provide that they were assignable.

On or about February 9, 1970, Fibrasa obtained the requisite bills and executed a draft against this letter of credit made payable to the order of Banco Do Brazil. Said draft was forwarded by Banco Do Brazil to Hibernia National Bank together with the requisite bills of lading and other documents subsequent to service of the garnishment, arriving in New Orleans subsequent to complainant's garnishment against Hibernia National Bank and prior to garnishee's answer to the interrogatories.

The District Court concluded that under these facts that the defendant, Fibrasa, had no property in the hands of garnishee at the time of garnishment and

attachment. The Court of Appeals for the Fifth Circuit agreed.

REASONS FOR GRANTING WRIT OF CERTIORARI

It is respectfully submitted that the Court of Appeals for the Fifth Circuit has created a conflict with the decision of the Court of Appeals for the Second Circuit in *Venizelos S.A. v. Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970). It is submitted that the Court of Appeals for the Fifth Circuit has misconstrued important aspects of Louisiana decisional law and of commerical law relative to letters of credit transactions. Finally, it is submitted that the issue is one of considerable commercial importance relative to the conduct of international trade through the letter of credit arrangement.

ARGUMENT

The conflict between the circuits and the importance of this matter in international commerce and trade is best understood by consideration of the legal background with respect to the rights and obligations under the international letter of credit transaction. It is in this area that the Court of Appeals has erred with respect to the international credit transaction and to commercial law generally. The conflict between the circuits arises because under Second Circuit thinking, performance by the beneficiary of an international letter of credit will irrevocably bind the issuing bank while under Fifth Circuit thinking, the bank's liability is imperfect. The decision of the Fifth Circuit in this matter is of importance to all who are creditors of

foreign nationals who cannot be found within the United States. As a result of the decision below, foreign debtors may do business in the United States through the medimum of letter of credit arrangements without fear that American creditors may reach the proceeds of the sale of the foreigner's goods while said proceeds repose in the possession of American banks.

A. Errors Relative To State Law And Commercial Law With Respect To The Letter Of Credit Transaction.

The appellate court misapprehended the valuable property right seized by appellant on March 20, 1971. The appeals court equated property with meaning an absolute liability on the part of the Hibernia Bank to pay. The error in this thinking is in regarding but one side of the letter of credit obligation, namely, the duty of the promisor bank to pay at the moment of the attachment. There is another side of that obligation, the right of the promisee beneficiary to perform and demand payment by the bank. This is a valuable right. In this case on March 20, 1970, the promisee had the right to produce the right documents by the date of expiration of the letter of credit and demand $248,000.00. Petitioner seized the promisee's rights to demand payment after the promisee had performed.

The concept of property as embraced in the law of Louisiana is broad indeed and embraces all manner of property. Louisiana Code of Civil Procedure Article 5251. As pointed out in the Trial Court's opinion, Article 240 of the Louisiana Code of Practice permitted attachment of a defendant's "property, rights, or credits."

Petitioner seized valuable rights of Fibrasa, the right to perform and obtain $248,000.00. The appellate court erred in not considering the seizure of this right through its equating property as meaning an obligation absolutely due by the Hibernia Bank. Louisiana's concept of property is far broader.

The proof of the value of the right to demand performance by the Hibernia Bank lay in the fact that Fibrasa shipped goods of great value to the United States on the strength of the right to demand monies on presentation of drafts and documents. On the strength of that same right, the Banco do Brazil presumably paid Fibrasa and undertook to collect sums from Hibernia. See *Scanlon v. First Nat. Bank*, 249 N.Y. 9, 162 N.E. 567; *Courteen Seed Co v. Hong Kong & S. Bkg. Corp.*, 261 App.Div. 495, 215 N.Y.S. 525 aff'd. 245 N.Y. 377. 157 N.E. 272.

Even if an absolute obligation to pay was required, that obligation existed on March 20, because the court below did not realize that Fibrasa had performed as of the date of seizure and that the Bank was bound at that moment. The letters of credit called for payment of sight drafts when accompanied by documents. On February 9, 1970, the respondent executed three drafts drawn against the letters of credit. These drafts were accompanied by appropriate documents. The drafts were drawn and the documents submitted and on their way to New Orleans prior to the attachment and seizure. The respondent had performed as of March 20, 1970. and, therefore, Hibernia was bound. *Venizelos S.A. v. Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970). The lower court has erred in holding that the

debt herein was merely contingent. It cited the case of *Moduel v. Mousseaux*, 29 La.Ann. 228 (1877), to the effect that property is subject to garnishment as to debts absolutely due by the debtor although not exigible. Exigible in the law of Louisiana means liquidated, demandable or matured. *Gulf Refining Co. v. Glassell*, 186 La. 190. 171 So. 846 (1936). In the case at bar, as previously pointed out, the debt was demandable, the goods were on their way, they belonged to the Bank and all that remained was the presentation of the sight draft.

A contingent liability is a liability which becomes due at some future time upon the occurrence of some future uncertain event. *Warren Co. v. C. I. R.*, 135 F.2d 679 (5th Cir. 1943). In this case, the uncertain event that occurred prior to the seizure herein, namely, the seller performed his obligation.

The lower court erred in classifying the obligation herein as contingent.

Authority for proceeding in the manner undertaken by petitioner herein is found in *Ericksson v. Refiners Export Co., Inc.*, 264 App.Div. 525, decided in the Appellate Division of New York. In that matter, an irrevocable letter of credit issued to a specifically named seller. The beneficiary assigned the proceeds to a third party, as was done in the case at bar. There, as here, a creditor of the beneficiary attached the property interests, whatever they might have been, of the beneficiary in the proceeds of the letter, by serving an attachment on the issuing bank before the issuing bank paid. The New York court upheld the seizure and recognized the rights of the attaching creditor.

B. Conflict Between The Circuits.

The Court of Appeals decision herein creates a conflict between the Second Circuit and the Fifth Circuit. In *Venizelos v. Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970), the Second Circuit held that where a beneficiary has performed under a letter of credit, then the bank is bound. In that case, there was no performance and, therefore, an attachment seizure seized nothing. In the case at bar, there was performance by the beneficiary within the meaning of *Venizelos* and, therefore, the Bank under *Venizelos* became bound. The decision of the Fifth Circuit is to the effect that even though there had been performance by the beneficiary, there was still no obligation on the part of the bank. In this case, the goods were shipped to the order of the Bank C.I.F. and were on their way at the time of seizure. The drafts were drawn and the documents were in transit. The goods belonged to the Hibernia Bank, but were then not paid for. The Bank bore the risk of loss for the seller's goods. Gilmore and Black, The Law of Admiralty, 97-98. The petitioner seized the respondent's right to claim the funds after performance by the respondent. The Fifth Circuit erred in holding that at the time of the seizure after the goods had been shipped there was no absolute liability on the part of the Bank, that its liability was only contingent. The Bank was then owner of the goods and bore the risk of loss as to them. The Bank's liability had been perfected.

The decision in the instant case conflicts with the decision in *Venizelos* of the Second Circuit. In the one case performance by a party was held to be the re-

quirement necessary to bind the Bank and in the second case the obligation after performance is looked upon as imperfect and contingent.

C. Important Social And Commercial Policy Considerations.

Petitioner respectfully avers that the issues raised herein are of social importance to the international commercial world. The instant decision permits foreigners to do business in the United States with impugnity. It permits them to enjoy a preferred status as to credits due them. It, in effect, removes obligations owed by American banks to foreign creditors from seizure by American creditors of the foreign debtors. Under the thinking of the decision herein, the only moment when an American creditor might attach and seize the funds due it from a foreign debtor would be the interval between the time of acceptance by an American bank of a sight draft and payment of that sight draft. The Court should consider the fact that the instant case permits foreigners to do business in the United States without fear that the proceeds from the sales of their products might be subject to seizure to satisfy debts due by the foreigner to the American creditor.

If a foreign seller can export to the United States, never appear in the country, handle all the financing through financiers and assignees, sell and still escape liability for prior debts, then where lies any protection for those Americans doing business with the foreigner? Does the American buyer have to obtain a foreign judgment, or at least foreign execution of a domestic

judgment, in the seller's own land? Does public policy permit a party to export to the United States, commit a wrong or break a promise, to an American and then depart to his homeland to continue to do business in this country through international financing, never having the property he exports subject to levy and attachment in this country. The result seems extreme, but what other property could such a party have in America except what was seized herein? The cargo? — Manifestly not. Title to the cargo passed under a C.I.F. bill lading to Hibernia when loaded aboard the vessel in a foreign port. Debt of Twi Ropa in America? — no, manifestly not. The American buyer ultimately buys his property from the bank not from the true seller. He purchases the bills of lading by paying the bank a sum of money. He is at most secondarily liable for the price. His dealings with the foreign seller have long since ended. What then is left? Only the letter of credit and rights arising therefrom in the direct contract between bank and seller or on the obligation to pay for cargo, title to which is vested in the bank. The force of the holding complained of is that a foreign corporation can sell $200,000 worth of cargo in the United States without ever having a debt owed by any person in the United States. The court has erred.

The fact that this letter of credit is or created property is demonstrated by the facts in this case. Because of the rights conferred by the credit, bankers, merchants, shippers, and producers of goods brought over $200,000.00 in sisal into the United States. The policy question before this Court is whether a foreign corporation can do business in this country with complete immunity for his assets from judicial seizure or attach-

ment. Can a foreign exporter who incurs obligations in this country escape responsibility for said obligations by financing his export/import obligations through a letter of credit.

CONCLUSION

For the above and foregoing reasons, it is respectfully submitted that a writ of certiorari to the Court of Appeals for the Fifth Circuit be granted herein.

Respectfully Submitted,

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CERTIFICATE

I HEREBY CERTIFY that three copies of the above and foregoing petition have been served upon MR. HAROLD R. AINSWORTH, 2307 American Bank Building, New Orleans, Louisiana 70130 and upon MR. LOUIS B. CLAVERIE and MR. PAUL HAYGOOD, 1300 Hibernia Bank Building, New Orleans, Louisiana 70112, by depositing same in the United States Mails, first class postage prepaid, this ____ day of MARCH, 1972.

WILLIAM A. PORTEOUS, III

APPENDIX

Case Reported at 450 F.2d 419 (5th Cir. 1971)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2008

SISALCORDS DO BRAZIL, LTD.,
Plaintiff-Appellant,
versus

FIACAO BRASILEIRA DE SISAL, S.A.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(October 28, 1971)

Before TUTTLE, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM: This is an appeal from the judgment of the trial court dismissing a complaint based on an attachment seeking to subject the credit allowed in a letter of credit issued by Hibernia National Bank to garnishment.

The letter of credit issued to the Appellee did not create property belonging to it in the hands of the issuing bank. Thus the trial court properly upheld the answer of the garnishee to the effect that it held no property subject to garnishment. The exposition of the facts as contained in the memorandum opinion of the trial court cannot be improved upon. We affirm the judgment on the unpublished opinion of the trial court, which is appended hereto.

The judgment is AFFIRMED.

BOYLE, District Judge:

The defendant has moved to dismiss the complaint on the ground that the Court lacks jurisdiction. The events relevant to this matter are:

On March 20, 1970, Sisalcords Do Brazil, Ltd., plaintiff herein, petitioned a state court in Louisiana for recognition of a default judgment obtained in a New York State court against Fiacao Brasileria De Sisal, S.A. (FIBRASA), defendant herein. That same day a non-resident writ of attachment was obtained by the plaintiff in order to effect the seizure of defendant's property, naming the Hibernia National Bank in New Orleans, hereafter referred to as Hibernia, garnishee, upon whom garnishment interrogatories were served.

On April 7, 1970, defendant had the suit removed to the United States District Court for the Eastern District of Louisiana. The garnishee, Hibernia, filed answers to plaintiff's garnishment interrogatories on May 4, 1970, stating that it did not have any property,

rights or credits belonging to or due defendant, FIBRASA, at the time of service of the interrogatories. However, Hibernia did admit having issued in favor of FIBRASA two letters of credit numbered 24349 and 24381, dated February 9, 1970, and March 6, 1970, respectively. Hibernia also admitted that subsequent to service of the attachment it received three drafts drawn by FIBRASA against letter of credit #24349 payable to Banco Do Brasil, S.A. The proceeds of the drafts were remitted in accordance with the instructions of Banco Do Brasil. Hibernia stated in its answer that these drafts were the property of Banco Do Brasil.

Defendant brought its first motion to dismiss on May 5, 1970, urging that it had no property in the jurisdiction. On July 10, 1970, plaintiff filed an amended and supplemental complaint in which it alleged the same cause of action originally brought against defendant in New York, apparently because the basis of the Louisiana action, the New York judgment, had been vacated in May of 1970. No new garnishment against the Hibernia Bank was sought when the complaint herein was amended to assert a different cause of action.[1] Defendant, FIBRASA, again moved for dismissal for lack of jurisdiction on the grounds that it was not subject to personal service within the jurisdiction nor was proper service made. Plaintiff opposes both motions contending that jurisdiction over defendant was obtained through the non-resident writ of attachment.

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[1] In view of the result which we reach, we do not consider whether a further garnishment was necessary in order to obtain jurisdiction over the defendant.

Plaintiff concedes that if the letters of credit are not property within the meaning of the Louisiana provisions concerning attachment and garnishment, this Court has no jurisdiction. The sole question to be determined is whether said letters of credit are such property. If they are not, there was no attachment through which this Court could obtain jurisdiction. We hold they are not.

According to Article 9 of the Louisiana Code of Civil Procedure, a court has jurisdiction to render a money judgment against a non-resident provided that the action is commenced by an attachment of his property within the state. This article also provides that where the non-resident does not subject himself personally to the jurisdiction, the judgment rendered may be executed only against the property attached. Garnishment under a writ of attachment is governed by the provisions applicable to garnishment under a writ of fieri facias which are found in La. C.C. Pro. Art. 2411 et. fol. Property is defined by Article 5251, La. C. C. Pro. as including "all classes of property recognized under the laws of the state: movable or immovable, corporeal."[2]

To determine whether there was property belonging to defendant and whether that property was effectively seized it is necessary to consider the nature of a letter

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[2]Comment C under La.Civ. P. Art. 3541 (Grounds for Attachment) states:

> The source article [Art. 240 of the Code of Practice] refers to the defendant's "property, rights, or credits." The simple term property is sufficient to include all species of property, and is used throughout the title.

of credit. "A commercial letter of credit is a written instrument, ordinarily issued by a bank, authorizing someone, generally the seller of goods, to draw in accordance with certain terms and stipulating that such bills will be honored." 50 Am. Jur.2d *Letters of Credit* §1.

Generally, the terms of the letters of credit are that specified shipping documents and bills of lading accompany the drafts when presented for payment within a specified time period. A letter of credit facilitates commerce in that it enables the buyer to withhold payment until the goods are received, allows a bank to lend its credit without actually using its funds and permits the seller to receive his payment upon shipment of the goods. In all, three contracts are involved: the contract of sale between the buyer and the seller, the contract between the bank and the buyer who procures the letter, and the letter of credit between the issuing bank and the seller. 50 Am. Jur. 2d, *Letters of Credit* §4. *Venizelos, S.A.* v. *Chase Manhattan Bank*, 425 F.2d 461 (2d Cir. 1970).

Since a bank deals in instruments and not goods, it is not concerned with the contract of sale between the buyer and seller, and undertakes that it will honor drafts drawn and negotiated only in strict compliance with the terms of the letter. *Venizelos, S.A.* v. *Chase Manhattan Bank*, supra.

In this case, Hibernia issued two letters of credit in favor of defendant, FIBRASA. Letter #24349, dated February 9, 1970, was issued for any sum or sums not

exceeding $206,087.00 and contained the expiration date of May 25, 1970; letter #24381, dated March 6, 1970, was issued for any sum or sums not exceeding $42,-660.00 and contained an expiration date of May 1, 1970. Both letters stated that any drafts drawn against such letters must be accompanied by certain documents specified therein and that the drafts would have to be presented prior to the dates on which said letters expired.

On March 20, 1970, the date on which Hibernia was served with the writ and interrogatories, the letters of credit had been issued, but no drafts had been drawn against the letters nor had any shipping documents been received by Hibernia. As of that date, Hibernia had no absolute liability to FIBRASA since liability of the issuer of a letter of credit attaches only upon strict compliance with the terms of the letter before its expiration date. Since the conditions required to be performed for Hibernia to be obligated on the letter of credit had not been performed, Hibernia was not obligated on the letter of credit. *Venizelos, S.A.* v. *Chase Manhattan Bank*, supra.

Under Louisiana law the efficacy of an attachment is determined according to the facts existing at the date of the issuance of the writ and, if defective, it is not cured by subsequent events. *Anisman* v. *Nagle*, 177 La. 583, 148 So. 885 (1933) and cases cited therein; *Forbess* v. *George Morgan Pontiac Co.*, 135 So.2d 594 (1961). As of the date on which the writ and interrogatories were served, Hibernia had no funds in its possession which belonged to FIBRASA nor did it have

an absolute liability to FIBRASA under the letter of credit.[3]

Louisiana courts have determined that only property held by a garnishee, or debts absolutely due by him, though not exigible, at the moment the interrogatories are served are subject to seizure under a garnishment proceeding. *Moduel v. Mousseaux*, 29 La. Ann. 228 (1877). Except when provided for by statute contingent liabilities are not subject to garnishment. *Simon*

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[3]The New York case of *Seider* v. *Roth*, 17 N.Y. 2d 111, 269 N.Y.S. 2d 99, 216 N.E. 2d 312 (1966), involved the attachment of a contractual obligation. An automobile liability policy was issued in Canada to a Canadian motorist by an insurer doing business in New York. The insured had an accident in Vermont and under the policy the insurer was required to defend in any automobile negligence action. The question in *Seider* was whether the contractual obligation of the liability insurer was a debt owing to the insured which would be subject to attachment and whether jurisdiction was properly acquired by such an attachment. In answering the question in the affirmative the court stated:

> The whole question, therefore is whether Hartford's contractual obligation to defendant is a debt or cause of action such as may be attached. The Hartford policy is in customary form. It requires Hartford, among other things, to defend Lemiux in any automobile negligence action and, if judgment be rendered against Lemiux, to indemnify him therefor. Thus, *as soon as the accident occurred* there was imposed on Hartford a contractual obligation which should be considered a "debt" within the meaning of CPLR 502 and 6202. (Emphasis added.) 216 N.E. 2d at 314.

Though the policy existed, the contractual obligation which was held subject to attachment did not arise until the accident occurred.

It can be seen by analogy that the contractual obligation of Hibernia, in today's case, did not arise until the drafts and appropriate shipping documents had been received. Prior to that time there was no "debt" owing to the defendant by garnishee Hibernia.

v. *Hulse*, 124 So. 845, 12 La. App. 461 (1929); *Smith* v. *Tooke*, 120 So. 651, 10 La. App. 461 (1929). The principle enunciated in *Coleman* v. *Fennemore*, 16 La. Ann. 253 (1861), is apposite here. There, a garnishee had answered interrogatories, stating that it had no present indebtedness to the defendant, nor any future indebtedness except that contingent on the completion of a contract. This answer had not been traversed; therefore, the attempted garnishment was held not binding on the garnishee. In the present case the plaintiff failed to traverse Hibernia's answers to the garnish interrogatories which are similar to the answers in the *Coleman* case.

In attempting to show that the rights of the defendant to draw against the letters of credit are property rights which could be garnished, counsel for the plaintiff cites some interesting examples. Other than debts owed and unearned wages, clearly subject to garnishment, examples of property such as the right of a student to remain in school and the right of a tenant to public housing are suggested. One would hardly agree that the latter two "property rights" could be garnished under a writ of attachment. It is also noticed that any rights of the plaintiff under the letters of credit no longer exist since both letters of credit have long since expired. Furthermore, both letters of credit had expired prior to the filing of plaintiff's amended and supplemental complaint. Where jurisdiction is sought under a non-resident writ of attachment and there no longer exists the seized property on which jurisdiction is based, this court would be called upon to do a useless act. Execution of any judgment in favor of the plain-

tiff would be limited to the no longer existing property rights and would not personally bind the defendant unless it submits to the jurisdiction, which it has not.

Plaintiff also cites *Strawberry Growers' Selling Co.* v. *Lewellyn*, 158 La. 303, 103 So. 823 (1925), for the proposition that credits, such as represented by a letter of credit, are subject to garnishment. But in that case the only property attached, as shown by the answer of the garnishee, were funds of defendant deposited in the garnishee bank. While funds or credits may be attached, the facts of the present case, as revealed by the answers of the garnishee and the letters of credit found in the record, show that there were neither funds nor credits due the defendant as of the date on which the writ of attachment was served.

The Motion will be granted.

(Signed) EDW. J. BOYE, SR.
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
March 29, 1971

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2008

SISALCORDS DO BRAZIL, LTD.,
Plaintiff-Appellant,
versus

FIACAO BRASILEIRA DE SISAL, S.A.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Oct. 28, 1971, 5 Cir., 1971, ___ F.2d ____).

(December 8, 1971)

Before TUTTLE, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.